Supreme Court, U.S.
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No. 92-1589

In The

Supreme Court of the United States

October Term, 1992

EXXON SHIPPING COMPANY,

Petitioner,

v.

THEODORE M. ELLENWOOD and
ANN M. ELLENWOOD,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether maritime law preempts the application of a state fair employment handicap discrimination statute in an appropriate case.

2. Whether section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793(a), preempts the application of a state fair employment handicap discrimination statute against a federal contractor.

3. Whether maritime law recognizes a contract of employment between an employee and his employer under the facts of this case.

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Theodore M. and Ann M. Ellenwood respectfully request that this Court deny the petition for a writ of certiorari seeking review of the opinion and judgment of the Court of Appeals for the First Circuit, entered on January 14, 1993, and reported at 984 F.2d 1270 (1st Cir. 1993) (App. 1a-38a).[1]

OPINIONS BELOW

In addition to those opinions referenced by the Petitioner, another pertinent opinion is the United States District Court for the District of Maine's Memorandum and Order on Defendant's Motion for Judgment as a Matter of Law or For New Trial dated March 26, 1992, which is reproduced at 1a-15a.

STATUTES INVOLVED

The Savings to Suitors clause, 28 U.S.C. § 1333, provides, in relevant part:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. . . .

STATEMENT OF THE CASE

A. Introduction

This case concerns a maritime employee who was fired from his job in the wake of the 1989 Exxon Valdez disaster solely because in 1988 he had sought treatment for what he believed to be alcoholism. Because petitioner's statement of

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[1] References to "App. ___" are to the pages of the Appendix included within the Petition for Writ of Certiorari. References to "___a" are to pages of the Appendix included within this Respondents' Brief in Opposition.

the case and the facts is significantly incomplete and inaccurate (and argumentative), respondents provide the following statement.

B. Background

On April 7, 1970, Exxon Shipping Company (or its predecessor) ("Exxon") hired Theodore M. Ellenwood ("Ellenwood") as a temporary employee to sail as a Third Assistant Engineer (Plaintiffs' Exhibit 57-A). The following year, recognizing that it might lose a talented and valuable employee, Exxon hired him permanently (Tr. Vol. I:91). Once it made him a regular employee, Exxon committed itself to only terminate Ellenwood's employment for just cause (Tr. Vol. I:93). Ellenwood quickly became a Chief Engineer, the highest ranking shipboard engineer and the top rung of Ellenwood's intended career ladder (Tr. Vol. I:92; Plaintiffs' Exhibit 57-E).

In the late 1970's and early 1980's, Exxon sought to rid itself of Ellenwood's union. Once Exxon accomplished this task, Mr. Schwartz, a senior official of Exxon, wrote Ellenwood a letter on behalf of the Company which expressly guaranteed that even without the union, Exxon would continue to respect their collective bargaining agreement as it applied to Ellenwood and that Ellenwood's working conditions would remain the same (Tr. Vol. I:94; II:21). Consequently, Ellenwood's employment continued to be terminable only for "just cause" as a matter of contract, and, as one would logically expect, he relied on his employer's letter and representations to this effect (Tr. Vol. I:94). Since sending Ellenwood the Schwartz letter, Exxon has never told him that he was employed on any basis other than a contract terminable for just cause and certainly never at will (Tr. Vol. I:94). Ellenwood and Exxon both expected, encouraged and planned for him to work until January 2011 (Tr. Vol. I:95). Thus, Ellenwood and Exxon had an express contract of employment for a specific limited duration terminable only for just cause. Amongst other evidence and arguments, Ellenwood contended

at trial and the jury could find from the evidence that Exxon's termination of his employment breached their contract.

In 1984, Exxon's Board of Directors adopted and formally published a policy on alcoholism (Plaintiffs' Exhibits 1, 11). This Directors' policy was a continuation of Exxon Corporation corporate policy established during the 1970's. Under the Board of Directors' policy, if an employee voluntarily sought alcohol rehabilitation, his "job security" and "future career opportunities" would never be "jeopardized" (Tr. Vol. I:108). Exxon testified that the "essence" of that policy from the 1970's continued beyond the time of Ellenwood's removal from his ship (April 13, 1989) (Tr. Vol. VI:128).

Thus, this Board of Directors' policy remained in effect during the time period relevant to this case. In 1988, when he entered alcohol rehabilitation at Mercy Hospital in Portland, Maine, Ellenwood "absolutely" believed this Directors' policy applied to him (Tr. Vol. I:108, 111, 112, 114). Ellenwood had many reasons for his sincerely held belief including, a) seeing other employees rely upon the policy and thus having their job security and career opportunities protected by it (Tr. Vol. I:108); b) being encouraged to rely on the policy as though it were "God's word" (Tr. Vol. I:108); c) being directed by Exxon to encourage other employees to take advantage of the policy in his role as an Exxon manager; d) there being no other Board of Directors' policy on the subject; and e) believing the Company's signed statements and commitments made to Ellenwood in their annual Business Ethics policy dealings (Tr. Vol. I:111).

At the relevant times, Exxon never replaced nor superseded the 1984 Board of Directors' Policy (Tr. Vol. V:169; I:109, 110, 112, 114). In fact, when Ellenwood worked temporarily in Exxon's headquarters during June and July 1989, the Board of Directors' Policy was openly and readily at employees' fingertips (Tr. Vol. I:108; VI:141).

In addition, Exxon management issued other letters and policies, none of which were communicated as coming from the Board of Directors and none of which were intended to modify, replace or displace the 1984 Board of Directors'

Policy (Tr. Vol. I:108-112). For example, in 1987, Exxon's President issued his own policy statement about substance abuse (Plaintiffs' Exhibit 2). Ellenwood learned about this statement during a twenty minute presentation to fleet officers (Tr. Vol. I:109-110, 114). After the two Human Resource Managers[2] read the letter, the attendees became very suspicious and began to make remarks (Tr. Vol. I:110). In response, the Managers stated: "this isn't intended to do anything, no one will get hurt. . . . (N)o one will get hurt as a result of this letter." (Tr. Vol. I:110).[3]

Exxon also proudly promulgated a very important Business Ethics policy signed by the President of the Company "to reemphasize Exxon's commitment to ethical and honorable conduct in all aspects of (its) business and the responsibilities of every individual to respect *the commitment.*" (Plaintiffs' Exhibit 9, 9A) (emphasis supplied). Every December, as a condition of employment, Exxon required Ellenwood (and all other employees) to sign an agreement to be bound by that policy (Tr. Vol. I:110).

When Ellenwood entered Mercy Hospital in March 1988, he expressly relied upon these various contracts, representations, letters, statements and policies that his job and career as Chief Engineer would not be jeopardized merely because he sought treatment for alcoholism (and so long as he was successful in his treatment (and that none of this would ever constitute just cause for taking his job and career from him)) (Tr. Vol. I:111, 112, 114, 120). Otherwise, he would have attended Mercy Hospital's 28 day treatment program at a time when it would not have interfered with his 60 day on – 60 day off work schedule and thus when Exxon would never have known about it (Tr. Vol. I:116).

Ellenwood's rehabilitation efforts were totally successful. In Exxon's own words, Ellenwood "made the contract

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[2] Including Daniel Paul, Exxon's Secretary (Tr. Vol. V:167).

[3] Even if it did apply, the jury easily could have found from the evidence that it gave Ellenwood contractual and estoppel rights which Exxon nonetheless violated in this case.

with the Company" and returned to work on May 2, 1988 (Tr. Vol. V:22).

At the relevant times,[4] Ellenwood sailed as one of two Chief Engineers aboard the Exxon Wilmington. The Wilmington sailed along the coast, between three ports in New Jersey and Baton Rouge, Louisiana (and not on the high seas despite petitioner's suggestion to that effect) (App. 42a, n.5). The Wilmington's performance won it many awards for 1988 (Plaintiffs' Exhibits 14, 18,66; Tr. Vol. V:151-152; XI:49-51).

On March 24, 1989, the Exxon Valdez crashed in Alaskan waters. The public began cutting up their Exxon credit cards (Tr. Vol. VIII:148). The *media* associated the crash with alcohol. Exxon had a public relations crisis on its hands. Ellenwood was aboard the Exxon Wilmington at the time of the Valdez crash (Tr. Vol. I:135).

On or about August 4, 1989, Human Resources Manager Paul officially notified Ellenwood that he would never again sail as an Exxon Chief Engineer (Plaintiffs' Exhibit 16).[5] Exxon's only reason was Ellenwood's *participation* in an alcohol rehabilitation program some seventeen months before (Tr. Vol. V:181-183).[6] Exxon's motivation was purely financial (Tr. Vol. V:170; VI:139; VII:148). Admittedly, the Company had no knowledge of the nature of Ellenwood's problem, only the fact that he had sought treatment. Also, it is undisputed that Ellenwood never had an issue with alcohol at or

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[4] 1988-1989.

[5] Recognizing its contractual obligation to him, Exxon admittedly considered and rejected exempting or grandfathering Ellenwood from its new policy. Exxon decided that it could not take this minuscule risk on the basis of business judgment (and nothing more specific nor articulable than that), even though, under Exxon's 1989 policy and U.S. Coast Guard regulations, Ellenwood would have been subject to periodic and random drug and alcohol testing (Tr. Vol. VI:145; V:178-180, 202-203). In addition, Exxon's decision had actually been made in April 1989 but the Company hedged and kept it from Ellenwood until the last possible moment (Tr. Vol. VI:133-135; V:183).

[6] Attending alcohol rehabilitation was not one of the just cause offenses posted on-board ship (Tr. Vol. VI:147). *Compare, Stetson v. S/V Sun Cloud*, 673 F. Supp. 1130, 1135-1136 (D. Mass. 1987).

near the workplace (Plaintiffs' Exhibit 5; Tr. Vol. IV:191). In fact, Exxon's nationally acclaimed expert opined that Ellenwood has never been an alcoholic (Tr. Vol. V:133). Nor did he find any evidence that Ellenwood had a substance abuse problem as defined in Exxon's September 1, 1989 policy (Tr. Vol. V:135).

Ellenwood filed Rehabilitation Act charges with the Office of Federal Contract Compliance Programs in September 1989 (Tr. Vol. VI:106-107). This suit, alleging unrelated causes of action, followed in March 1990. Contrary to what Exxon tells the Court, the lawsuit was not filed simultaneously with the OFCCP complaint.

Exxon breached its contract with Ellenwood based upon what *it* termed a change in company policy. The "policy" disqualified for life any employee who had ever (even 40 years ago) been *treated* for alcoholism from sailing as a Chief Engineer (Tr. Vol. II:60; V:179). To be affected, the employee did not have to have ever been an alcoholic, it only mattered that the employee sought treatment for alcoholism at some point in his life (Tr. Vol. VII:190; V:181).[7] It also did not matter what contractual arrangements existed between Exxon and the employee. Exxon knew it would be challenged in legal proceedings and calculated that it would take this risk (Tr. Vol. III:77; V:200; VI:150-151). Also, to the extent it is even relevant, while the policy pegged the Chief Engineer as a "designated" safety sensitive position, Exxon never proved why the position was safety sensitive nor that the positions were narrowly defined, and, furthermore, the jury was free to disregard any such evidence (Tr. Vol. IV:93; V:171, 175-180). Notably, the Wilmington's engine room can run *itself* for

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[7] Furthermore, this draconian policy *required* employees to disclose in writing whether they had ever attended an Alcoholics *Anonymous* meeting (Tr. Vol. III:174, 182; VIII:190, 191; Defendant's Exhibit 66). The policy states that if one has *ever* attended such a meeting, he is deemed to have a problem with alcohol, by definition.

fifteen hours per day (Tr. Vol. IV:142). Moreover, Exxon's policy actions were not required by U.S. Coast Guard regulations or other law (Tr. Vol. II:79; V:182).[8]

The irony of this "policy" change is that it was really aimed just at Ellenwood. Of Exxon's six hundred Gulf Coast fleet employees, Ellenwood was the only one impacted (Tr. Vol. V:153; IX:9). There were four others elsewhere in the Company, however it is unknown whether any had the same employment contract as Ellenwood (Tr. Vol. V:180).

Finally, contrary to Exxon's fatuous suggestion in its petition, Ellenwood was not "reassigned;" rather, at the eleventh hour, Exxon offered him two demotions intended to humiliate him and force him out of the company. Plaintiffs proved and the jury clearly found these offers to be demotions.

At trial, Exxon claimed to have searched the world, considering more than 20,000 positions as possible alternative jobs for Ellenwood (Tr. Vol. V:193-196). Despite its worldwide search, Exxon only made the first offer in November 1990, some nineteen months after removing him from his Chief Engineer's job (and during the pendency of this lawsuit) (Joint Exhibit 53). Exxon offered to demote Ellenwood to First Assistant Engineer, a position which Exxon admitted was the next best job (to Chief Engineer) for which Ellenwood was qualified (Tr. Vol. II:82-83; V:196). Exxon's offer was based upon a previously required contingency that Ellenwood pass a psychiatric examination (which he did the previous summer) (Tr. Vol. II:75). Also, even the demotion had limits on it. As Chief Engineer was a "designated" position, had Ellenwood agreed to accept this demotion, Exxon refused

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[8] This whole charade was a public relations ploy. The Company realized that the Valdez crash was not caused by the alleged use of alcohol (Tr. Vol. V:170; VI:138-139; X:171). The Court should take judicial notice that the Company's position in pleadings subject to *Fed. R. Civ. P.* 11 has been that the crash was caused by a defective navigational device. *See, Exxon Corporation and Exxon Shipping Company v. Sperry Marine, Inc.*, No. A91-526 Civ. (D. Alaska filed October 29, 1991).

in perpetuity to consider promoting Ellenwood to Chief Engineer or even to let him serve as Chief in a temporary, step-up capacity (Tr. Vol. V:197). Also, Ellenwood believed that he would have to abandon this lawsuit in order to accept either this or the following demotion (Tr. Vol. II:173, 175; III:54).

The second, more drastic demotion was to Encon Engineer, a position which Ellenwood was responsible for creating when he worked as an Exxon Port Engineer (Tr. Vol. II:85; IX:47). This position was just a glorified data entry clerk's position in a "career graveyard" (Tr. Vol. II:85-86, 180; III:54-55). Furthermore, the job was a lower-paying desk job without a five year salary guarantee (Joint Exhibit 53; Tr. Vol. II:85; V:197-199). Also, Ellenwood's career was at sea which is where his superior, Fleet Manager Koops, found him best suited to work before any of this happened (Tr. Vol. IX:42). Plaintiffs proved and the jury clearly found both positions to be demotions for these and many other reasons (Tr. Vol. VI:132).

C. The District Court Decisions

The district court submitted Ellenwood's breach of contract and estoppel claims to the jury which considered the evidence and returned a verdict in Ellenwood's favor. The evidence was such however that neither claim was necessarily based upon Exxon's 1987 policy statement. Exxon's biased statement to that effect is purely editorial. Further, the district court labeled Exxon's argument that the Rehabilitation Act preempted Ellenwood's contract claim as "clear nonsense" (App. 41a.). In its post-trial rulings, the district court again had an opportunity to address and reject these contract arguments (11a-12a).

D. The First Circuit Decision

1. Lack of Maritime Preemption

The First Circuit appropriately held that courts may apply state employment discrimination statutes in appropriate maritime cases. The First Circuit followed the decisions of

this Court in holding that "courts in admiralty cases may reach beyond maritime precedents and apply state laws 'absent a clear conflict with the federal [maritime] law,' " (App. 16a) *quoting, Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 341 (1973). The First Circuit went on to state:

> we have been shown nothing in substantive maritime law that is even potentially at odds with state human rights statutes such as those underlying Count IV of Ellenwood's complaint. . . . We find no indications that the absence of substantive maritime law governing issues concerning individuals with handicaps reflects a federal interest in protecting maritime employers from such obligations. (App. 18a).

2. Lack of Rehabilitation Act Preemption

The First Circuit engaged in a substantial and detailed analysis of Exxon's argument that section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793, preempts Ellenwood's state law handicap discrimination claim and concluded that Exxon's argument is patently baseless (App. 4a-14a). The First Circuit thoroughly distinguished *Howard v. Uniroyal, Inc.*, 719 F.2d 1552 (11th Cir. 1983) which was a case of limited holding and which addressed the use of state law to circumvent section 503's lack of a private cause of action.

3. Maritime Employment Contract

Calling it an "obvious fact", the First Circuit agreed with the district court that "a maritime employer may make a contractual agreement with, or an enforceable promise to, its employees . . . " and that "(t)he jury found that the requirements for establishing a binding obligation were met." (App. 21a). The First Circuit went on and merely held that Exxon cannot avoid this "self imposed-obligation." *Id.* To the extent it is relevant, the jury did not necessarily even base its conclusion on the policy statement upon which Exxon has selectively focused. In fact, as described *supra,* the jury heard a great deal of evidence upon which it could have based its

verdict without even considering Exxon's chosen "policy" statement. Exxon's real complaint is that the jury refused to credit its evidence and arguments over respondents'. Furthermore, this decision is not a "departure" from the employment at will doctrine, which, contrary to Exxon's assertion, is not a "long-established maritime principle . . . " and clearly has nothing to do with this case (Petition, p. 8).

E. Further Proceedings

Exxon filed a Petition for Rehearing and Suggestion for Rehearing En Banc on January 28, 1993. The First Circuit denied Exxon's request on February 23, 1993.

REASONS FOR DENYING THE WRIT

The following reasons justify why the Court should deny Exxon's petition for a writ of certiorari.

First, the Court has already held that state and federal governments may jointly regulate issues that are both maritime and local. *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325; *Just v. Chambers*, 312 U.S. 383 (1941). Furthermore, the Court has held that states do have a strong local interest in prohibiting employment discrimination and therefore, federal preemption is not warranted. *Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.*, 372 U.S. 714 (1963). There is no need for this Court to formulate a new maritime rule that shields employers involved in admiralty from complying with those state anti-discrimination laws which appropriately apply to their conduct under traditional and time honored choice of law concepts.

Second, no conflict exists between this case and the decision of the Eleventh Circuit in *Howard v. Uniroyal, Inc., supra.* The two cases address unrelated and entirely different subjects. This case in fact has nothing to do with the Rehabilitation Act or its enforcement. Moreover in the realm of employment discrimination statutes, remedies overlap and do not preempt each other. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). No evidence exists that Congress

intended to insulate those employers fortuitous enough to hold a federal contract of $2,500 or more from unrelated obligations under state handicap discrimination law.

Third, the contract claim is fact intensive and hardly raises an important question of federal law sufficient to trigger this Court's review. The overwhelming evidence clearly demonstrates that Exxon and Ellenwood entered into a binding agreement which Exxon breached in the wake of the Valdez. As does every jurisdiction in this country, maritime law recognizes and enforces employment contracts such as the one which the jury found from the facts in this case. *Kossick v. United Fruit Co.*, 365 U.S. 731, 741 (1961). Finally, this is not an employment at will case and Exxon's argument about a broad impact on the maritime industry is wholly imaginary.

I. THE COURT DOES NOT NEED TO CREATE A NEW MARITIME RULE EXCLUDING MARITIME EMPLOYERS FROM COMPLIANCE WITH APPROPRIATE STATE DISCRIMINATION STATUTES.

The First Circuit's recognition of Ellenwood's right to pursue a claim based on state discrimination statutes is consistent with the precedent of the Court. The review of the First Circuit's decision by this Court is therefore not needed. Exxon essentially argues that this Court should fashion a new admiralty rule prohibiting a state government from protecting its citizens from employment discrimination. Exxon claims that such a maritime rule is needed to protect the uniformity of maritime law. Exxon's Petition is in reality a request that this Court extend admiralty's interest in uniformity leagues beyond that established by its precedents.

The Court has long recognized that states play a significant role in jointly regulating matters that have both a local interest and also impact maritime issues. In *Just v. Chambers*, the Court stated:

> it is not a principle of our maritime law that a court of admiralty must invariably refuse to recognize and enforce a liability which the State has established in dealing with a maritime subject.

Id., 312 U.S. at 387, 388. Subsequently, in *Romero v. International Operating Terminal Co.*, 358 U.S. 354 (1959), the Court reiterated that:

> It is true that state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system. But this limitation still leaves the States a wide scope. . . . Maritime law is not a monistic system. The State and Federal Governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history.

Id., 358 U.S. at 373, 374. In *Askew v. American Waterways Operators, Inc.*, the Court once again reaffirmed that both state and federal governments may regulate matters that impact maritime law.

> While Congress has extended admiralty jurisdiction beyond the boundaries contemplated by the Framers, it hardly follows from the constitutionality of the extension that we must sanctify the federal courts with exclusive jurisdiction to the exclusion of powers traditionally within the competence of the States. . . . Even though Congress has acted in the admiralty area, state regulation is permissible, absent a clear conflict with the federal law.

Id., 411 U.S. at 341. The power to eradicate American workplaces of employment discrimination has traditionally been within the competence of the states. *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282-83 (1987).

In *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 314-16 (1955), the Court succinctly set out the criteria used to evaluate whether maritime law preempts a state or local law. The first step is to determine whether the state or local law conflicts with any federal statute. If there is no conflict, then the Court must determine if there is "a judicially established federal admiralty rule governing" this issue and if there is no rule, then whether the Court should fashion one. *Id.*

State employment discrimination statutes do not conflict with any federal statute nor with any admiralty rule. Moreover, there is no pressing need for this Court to establish a

new admiralty rule that will exclude the states from prohibiting employment discrimination.

Exxon cites *Kossick v. United Fruit Co.*, 365 U.S. 731, to support its contention that the federal interest in a uniform set of laws for maritime law dominates to the exclusion of the local interests of the individual states in this matter. Exxon's citation to this case to support its contention that states are not able to prohibit employment discrimination when such discrimination touches maritime interests is far-fetched and off the mark; moreover, the *Kossick* Court's decision actually resolved the extent to which states may regulate employment related issues when they impact maritime interests. Thus, the issues which Exxon has presented in its petition are not issues which this Court needs to address again.

In *Kossick v. United Fruit Co.*, the Court held that New York's statute of frauds was preempted by maritime law. However, the Court held that the statute of frauds was preempted only because maritime law had a contradictory principle addressing that particular issue. In the case at hand, no such contradictory maritime law principle exists.

Furthermore, the *Kossick* Court pointed to several considerations that led it to favor preemption of New York's Statute of Frauds. The first consideration was that the dispute involved the enforcement of a contract "and therefore with obligations, by hypothesis, voluntarily undertaken, and not, as in the case of tort liability or public regulations, obligations imposed simply by virtue of the authority of the State or Federal Government." *Id.*, 365 U.S. at 741.

Second, the *Kossick* Court found that the contract under review was not "peculiarly a matter of state and local concern," *Id., quoting, Huron Portland Cement v. Detroit*, 362 U.S. 440 (1960). Finally, the *Kossick* Court held that the application of New York law would result in the invalidation of a contract recognized in admiralty and would therefore be more than just a supplementation of rights available in admiralty. In fact, application of New York law would deny otherwise available rights to a maritime employee.

In response to the *Kossick* Court's first consideration, Ellenwood's state discrimination claims do not involve[9] the enforcement of a maritime contract. Rather, this Court is dealing with state regulations prohibiting employment discrimination. This favors application of state employment anti-discrimination law. *Kossick*, 365 U.S. at 741.[10]

The states also have a strong local concern in prohibiting discrimination in employment and Congress has explicitly recognized this local concern. *Guerra*, 479 U.S. at 282-283. In passing the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ("A.D.A."), Congress made it clear that nothing in that Act should invalidate or limit in any way any state law that provides remedies, rights and procedures that allow greater or equal protection to individuals with disabilities. 42 U.S.C. § 12202(b). Thus, Congress has recognized that states do indeed have a strong local interest in protecting the rights of individuals with disabilities or those who are perceived to have disabilities. *Cf., English v. General Electric Company*, 496 U.S. 72, 110 S. Ct. 2270, 2279-81 (1990).

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[9] Although Ellenwood has asserted a claim under the discrimination statutes of Maine, New Jersey and Texas, the parties recognize that only the statute of one of the three states will apply in this case. The selection of the appropriate state will be resolved by the choice of law rules articulated in *Klaxon v. Stentor Mfg. Co.*, 313 U.S. 487 (1941) (holding that the state whose law will apply is the state whose laws would govern according to the valid choice of law rules of the forum state). Thus, Exxon need not worry about the application of the laws of the 50 states but only with the laws of those states where *Exxon chooses to do* enough business such that Exxon can fairly and equitably be held to be answerable to those states' laws. This standard is no different than those applied to any other multi-state corporation.

[10] Furthermore, Exxon's reliance on the dicta found in *Indiana Civil Rights Comm'n v. American Commercial Barge Line Co.*, 523 N.E. 2d 241 (Ind. App. 1988), *cert. denied*, 492 U.S. 920 (1989), for the proposition that the state discrimination laws in the case at hand will intrude on the maritime doctrine of seaworthiness is also misplaced. By the admission of Exxon's expert, the issue in this case is a perceived disability rather than an actual disability (Tr. Vol. V:133). A perceived disability by definition cannot implicate seaworthiness and thus, petitioner's argument has no applicability to this case. *Cf., Continental Airlines*, 372 U.S. at 722.

The Court has also recognized the strong local nature of the states' interest in prohibiting employment discrimination. For example, in *Colorado Anti-Discrimination Commission v. Continental Airlines*, 372 U.S. 714 (1963), the Court considered whether Colorado's requirement that employers refrain from racial discrimination unduly interfered with interstate commerce and specifically with the supposed need of an airline to be subjected to only federal anti-discrimination laws. In that decision the Court stated:

> Not only is the hiring within a State of an employee, even for an interstate job, a much more localized matter than the transporting of passengers from State to State but more significantly the threat of diverse and conflicting regulation of hiring practices is virtually nonexistent.
>
> . . .
>
> It is, of course, possible that States could impose such onerous, harassing, and conflicting conditions on an interstate carrier's hiring of employees that the burden would hamper the carrier's satisfactory performance of its functions. But that is not this case.

Id., 372 U.S. at 722. Likewise, the state regulations which would apply in this case do not "burden" petitioner to such an extent that it cannot satisfactorily perform its functions. First, there is no conflict in the manner the various state discrimination laws treat those perceived to be recovered alcoholics. Second, Exxon complains that it should only be burdened with complying with the Rehabilitation Act of 1973 (and now the A.D.A.) (which incorporates state law) and no more. To require more, Exxon complains, would unduly jeopardize the uniformity of maritime law. This reasoning does not hold up under closer scrutiny. In interpreting Section 503, and now the A.D.A., state law has been consistently relied upon in order to determine the extent of an employer's obligations under the federal laws. *See, e.g., Department of Labor v. Texas Industries, Inc.*, 47 F.E.P. Cases (BNA) 18, 27 (Dept. of Labor 1988), *citing, Rozanski v. A-P-A Transport, Inc.*, 512 A.2d 335 (Me. 1986). Since state handicap discrimination

laws already play a large role in determining the extent of Exxon's obligations under Section 503, the requirement that Exxon comply with certain state discrimination laws places no heavier a burden on it than it already faces under federal law. Therefore, state discrimination laws do not place "onerous, harassing and conflicting conditions" on Exxon and therefore do not unduly impact the "harmonious and uniform" characteristic of admiralty to which Exxon clings so dearly. *Colorado Anti-Discrimination Commission*, 372 U.S. at 722.

Finally, unlike in *Kossick* (where the Court found that the validation of oral contracts is peculiar to admiralty law), there is no rule regarding discrimination peculiar to admiralty that would warrant the invalidation of state discrimination laws as they apply to Exxon. In the employment law context, "maritime rights" have traditionally been supplemented with those provided by the states. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715 (1980). In holding that states may apply their workers' compensation laws to land based injuries that also fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* the Court stated:

> To be sure, if state remedial schemes are more generous than federal law, concurrent jurisdiction could result in more favorable awards for workers' injuries than under an exclusively federal compensation system. But we find no evidence that Congress was concerned about a disparity between adequate federal benefits and superior state benefits.

Id., 447 U.S. at 724. Like in the *Sun Ship, Inc.* case, the state discrimination law in the case at bar supplements maritime law; it does not supplant it nor is it engrafted onto maritime law as asserted by Exxon.

Exxon cites the Court's decision in *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917) to support its argument that admiralty's interest in uniformity is of central importance. However, the Court has steadily narrowed the application of its holding in that case over the years and now is primarily concerned with whether state regulation conflicts

with federal law in maritime areas and those unusual instances in which uniformity is required. *Askew v. American Waterways Operators Inc.*, 411 U.S. 325, 341 (1973).

Exxon's reliance on *Belanger v. Keydril Co.*, 596 F. Supp. 823, 825-826 (E.D. La. 1984), *aff'd.*, 772 F.2d 902 (5th Cir. 1985) in support of its position that the Fifth Circuit declined to enforce a state discrimination claim is misplaced and is a misrepresentation of the holding in that case. In *Belanger*, the plaintiff brought an age discrimination action against his former employer. The plaintiff's suit was brought under the Federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-34, the General Maritime Law and the Louisiana Age Discrimination in Employment Act. La.R.S. 23:97176. At the time of the plaintiff's discharge he was working on a drilling rig off the coast of the Republic of Zaire. The United States District Court for the Eastern District of Louisiana found that the ADEA did not apply to the plaintiff since the ADEA does not apply to American Nationals employed outside the United States by American employers. *Belanger*, 596 F. Supp. at 824. Next, the district court found that general maritime law does not provide a common law cause of action for age discrimination. However, most importantly, the district court did find that the employer was subject to Louisiana's state discrimination law.[11] Thus, *Belanger v. Keydril* is consistent with the First Circuit's decision here.

Furthermore, Exxon's claim that it might be subjected to fifty state discrimination statutes depending on the residency of its seamen does not hold water. Exxon, like every other employer, is only subject to the discrimination laws of the state whose laws would govern according to the valid conflict of laws rules of the forum state. *Day and Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975); *Klaxon v. Stentor Mfg. Co.*, 313 U.S. 487 (1941). Maine applies the "most significant relationship" test of the Restatement (Second) of Conflict of Laws § 6

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[11] The plaintiff's state age discrimination claim was tried to a jury. The jury ultimately found that the plaintiff's termination was not related to his age.

(1971) in which the protection of justified expectations of parties is a consideration in choosing which state's law will apply. *Mason v. Southern New England Conference Ass'n of Seventh Day Adventists of Town of South Lancaster*, 696 F.2d 135, 137 (1st Cir. 1982). Unless Exxon has a valid connection to a particular state it will not be subject to that state's discrimination statutes. Exxon's suggestion that it might be automatically subjected to fifty different statutes is a wild exaggeration. Like any other multi-state corporation, Exxon need only be concerned with the application of those states' laws where the equities of a given dispute justify their application.

Exxon has ignored that states are accorded the explicit right to play a part in maritime matters. 28 U.S.C. § 1331(1). It has also ignored the admiralty court's tradition of extending protection to seamen when possible. *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375 (1970). "Certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy." (App. 20A), *quoting, Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 327 (1990), *quoting, Moragne*, 398 U.S. at 387.

State and federal governments have long shared regulation of employment discrimination. Contrary to petitioner's assertions, no dominant federal interest is at stake that merits review by this Court. Accordingly, the Court should reject Exxon's petition.

II. ABSOLUTELY NO CONFLICT EXISTS BETWEEN DECISIONS OF THE FIRST AND ELEVENTH CIRCUITS AND THUS, THE PETITION SHOULD BE DENIED.

Petitioner asks the Court to grant a writ of certiorari to reverse the First Circuit's decision that section 503 of the Rehabilitation Act does not preempt state statutory handicap discrimination claims. In a ploy to grab the Court's attention, Exxon unabashedly claims a "sharp conflict" exists between the First Circuit's opinion in this case and the Eleventh Circuit's opinion in *Howard v. Uniroyal, Inc.*, wherein that

court, in what it described as a quite limited holding, declared that a state common law contract action could not be used to enforce section 503 (which itself allows for no private cause of action). *Howard,* 719 F.2d at 1558, 1561-62. The First Circuit, on the other hand, considered whether the Rehabilitation Act preempted state handicap discrimination statutes, and for that matter, whether the mere fortuity of holding a $2,500 federal government contract meant that the employer/contractor was thus exempt from the application of otherwise applicable state employment discrimination statutes. After a lengthy and well reasoned analysis, the First Circuit could reach but one conclusion: Congress never intended the Rehabilitation Act to preempt state statutory handicap discrimination claims against employers which happen to hold a federal contract.

Petitioner tells this Court that its "sharp conflict" relates to a finding of Congressional intent for uniformity. However, Exxon's uniformity argument actually relates to how one enforces "the affirmative action clause contained in the contract between his employer and the federal government." *Howard,* 719 F.2d at 1562. That issue has absolutely nothing to do with this case as Ellenwood did not sue to enforce section 503 (App. 11a). Moreover, despite what Exxon tells the Court, the First Circuit never drew a distinction between statutory and common law claims, rather the First Circuit drew a distinction between (1) claims seeking to enforce section 503 through channels other than those created by Congress under the Rehabilitation Act, and (2) claims seeking to enforce rights which co-exist with and are totally independent of the Rehabilitation Act.

Along these lines, the Eleventh Circuit was quite careful to denote the very limited scope of its holding in *Howard.*

> We find this interest *in enforcing the affirmative action clause,* expressed in section 503(b) and its implementing regulations, to be more substantial than that of the state in providing a remedy *in this limited class of third party beneficiary actions to enforce the same affirmative action clause.*

. . .

> We merely hold that *in this case* the remedy provided in precise detail by Congress in enacting section 503(b) was intended to be the plaintiff's *sole means of enforcing the affirmative action clause contained in the contract between his employer and the federal government.*

Howard, 719 F.2d at 1561-62 (emphasis supplied). The basis for the holding was that the Rehabilitation Act already provided a remedy for a breach of Section 503. *Howard*, 719 F.2d at 1561; *Muncy v. Norfolk and Western Railway Company*, 650 F. Supp. 641, 644 (S.D. W. Va. 1986); App. 10a. The Eleventh Circuit never considered the enforceability of state law rights which are unrelated to the Rehabilitation Act. Rather, the entire opinion focuses on whether state law could be used in a third party beneficiary mode to enforce section 503 of the Rehabilitation Act.

As noted above, federal employment discrimination laws overlap, rather than preempt, their corresponding state law counterparts. *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 47 (1974); *Muncy*, 650 F. Supp. at 644; *Raytheon Co. v. Fair Employment and Housing Commission*, 46 FEP Cases (BNA) 1089, 1099 (California Superior Ct., Santa Barbara County, 1988) (Based upon legislative history, the court found that Congress did not intend the Rehabilitation Act to occupy the field of employment discrimination against the handicapped by federal contractors); *Cf., Tate v. Browning Ferris, Inc.*, 833 P.2d 1218, 1222-1223 (Okla. 1992). Furthermore, when Congress enacted the Rehabilitation Act, it was fully aware of the existence of overlapping state remedies in employment discrimination cases and the existence of state handicap discrimination laws and other common law claims. *Miles v. Apex Marine Corp.*, 498 U.S. at 32, 111 S. Ct. at 325; *Cannon v. University of Chicago*, 441 U.S. 677, 696-697 (1979). Had it wanted the Rehabilitation Act to preempt state law, Congress knew the state of the law and would have expressly so stated. Congress chose not to preempt state law because it has consistently believed that state laws fill a

crucial role in eradicating the nation's workplaces of employment discrimination. *California Federal Savings & Loan Assn. v. Guerra,* 479 U.S. at 282-83; *Kremer v. Chemical Construction Corp.,* 456 U.S. 461, 468-69 (1982). "The exercise of federal supremacy is not lightly presumed." *Schwartz v. Texas,* 344 U.S. 199, 203 (1952). Moreover, a presumption exists against preemption which petitioner cannot overcome. *Cipollone v. Liggett Group, Inc.,* 60 U.S.L.W. 4703, 4706, 4707 (U.S., June 24, 1992); *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981).

Nonetheless, petitioner anchors itself to *Howard* and references the "pervasive" regulations issued under section 503. However, the Court has rejected the proposition that even comprehensive regulation is an implied attempt to displace state law. *E.g., English,* 110 S. Ct. at 2279; *R.J. Reynolds Tobacco Co. v. Durham County,* 479 U.S. 130, 149 (1986); *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 716-18 (1985). Otherwise, the power of preemption would be impermissibly delegated to the control of the federal agencies.

Congress' most recently stated and obvious intent is evident from the A.D.A.[12] which amended the Rehabilitation Act and which also will extend the same basic Rehabilitation Act protections to virtually all private sector employees. Thereunder, Congress preserved an express role for state handicap laws and made no indication that this constituted a change in method.[13] Clearly, had Congress intended to preempt state law, it would have said so.[14]

The A.D.A. addresses the issue of federal preemption of state law but does so with a narrow scope. "Nothing in this

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[12] At page 10 of the petition, Exxon gratuitously and somewhat deceitfully suggests that Ellenwood has a federal remedy under the A.D.A. Ellenwood has no such remedy available to him.

[13] *Heckler v. Turner,* 470 U.S. 184, 208-211 (1985) ("Were there any doubt remaining as to Congress' intention in 1981, subsequent congressional action would dispel it.").

[14] Congress is presumed to be thoroughly familiar with the state of the law. *Cannon,* 441 U.S. at 696-699.

chapter shall be construed to invalidate or limit the remedies, rights, and procedures of any . . . law of any State . . . or jurisdiction that provides *greater or equal protection* for the rights of individuals with disabilities than are afforded by this chapter." 42 U.S.C. § 12201(b) (emphasis supplied). The A.D.A. employment provisions also expressly address the issue of preemption and say nothing about intending to preempt state employment discrimination law. 42 U.S.C. § 12113(d)(3). Again, had Congress wanted the Rehabilitation Act to preempt state law, then it would have said so. *Cannon*, 441 U.S. at 703.

Finally, Congress' intent is apparent from the procedural provisions of the A.D.A. which incorporate a specific and important role for state handicap discrimination statutes into the A.D.A. 42 U.S.C. § 12117.[15] The following section amplifies this role.

> In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State or local law pursuant to the requirements of subsections (c) and (d) of this section.

42 U.S.C. § 2000e-5(b) (emphasis supplied); 42 U.S.C. § 12117. It is clear beyond peradventure that Congress never intended federal employment discrimination statutes to be used to preempt state laws on the same or similar subjects.

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[15] Also, this case is about employment discrimination against an employee who was treated for a non-work related alcoholism handicap after apparently being misdiagnosed (Tr. Vol. V:133). The two federal statutes and the three state statutes (only one of which will ultimately apply) are uniform on how to address this perceived handicap issue. In fact, respondents are not aware of any contrary authority on this issue. Consequently, even if petitioner's argument holds some water, this case does not present an instance where uniformity is in issue. *Cf., Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. at 721-22 ("the threat of diverse and conflicting regulation of hiring practices is virtually nonexistent. . . . It is, of course, possible that States could impose such onerous, harassing, and conflicting conditions on an interstate carrier's hiring of employees that the burden would hamper the carrier's satisfactory performance of its functions. *But that is not this case.*" (emphasis supplied).

Thus, even Exxon must concede that since the A.D.A. applies to federal contractors which happen to be employers with at least fifteen employees, then so must state law.

The Court reviewed an analogous issue in *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., supra.* Curiously, Continental raised the exact same argument as Exxon has here: "When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go further than Congress has seen fit to go." *Id.*, 372 U.S. at 722, *citing, Charleston & W.C.R. Co. v. Varnville Furniture Co.*, 237 U.S. 597, 604 (1915). However, in reply, the Court squarely rejected this proposition.

> But this Court has also said that the mere "fact of identity does not mean the automatic invalidity of state measures." To hold that a state statute identical in purpose with a federal statute is invalid under the Supremacy Clause, we must be able to conclude that the purpose of the federal statute would to some extent be frustrated by the state statute. We can reach no such conclusion here.

Id.; Cf., English, 110 S. Ct. at 2280-81; *Sun Ship, Inc. v. Pennsylvania,* 447 U.S. at 722; *See also, A.D.A.*, 42 U.S.C. § 12201(b).

Even more notable was Continental's unsuccessful "pervasiveness" argument concerning government contractor status and anti-employment discrimination provisions contained in various Executive Orders. In rejecting this strikingly similar argument, the Court succinctly held: "It is impossible for us to believe that the Executive intended for its orders to regulate all carrier discrimination among employees so pervasively as to preempt state legislation intended to accomplish the same purpose." *Continental Air Lines,* 372 U.S. at 725.

In conclusion, Exxon has failed to create an issue of enough significance for this Court to grant the petition. The decisions of the First and Eleventh Circuits are not in conflict. No evidence exists that Congress intended to preempt unrelated, independent state handicap law rights or remedies

for those few employees who work for employers which fortuitously have the federal government as a $2,500 customer. Common sense, precedent from this Court and the A.D.A. make it obvious that Congress intended otherwise. Accordingly, the petition should be denied.[16]

III. THE MARITIME EMPLOYMENT CONTRACT CLAIM IS WELL SUPPORTED IN THE LAW AND ON THE RECORD.

Two things are quite clear: the First Circuit's ruling is (1) not one of first impression, and (2) not one of such importance to merit review. Maritime contracts of employment, express, implied, oral or otherwise have formed a bedrock aspect of admiralty law from time immemorial. *Kossick*, 365 U.S. at 734-35, n.4; *Union Fish Company v. Erickson*, 248 U.S. 308 (1919); *Robertson v. Baldwin*, 165 U.S. 275, 282-83 (1897) ("From the earliest historical period the contract of the sailor has been treated as an exceptional one, and involving to a certain extent, the surrender of his personal liberty during the life of the contract."); *Farrell v. United States*, 336 U.S. 511, 519-521 (1949) (contract for even an indefinite term is nonetheless an enforceable maritime employment contract); *Tonseth v. Serwold*, 157 P.2d 333, 338 (Wash. 1945). Since 1790, Federal Court policy has been to protect the seaman and enforce his contract. *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 356 (1971); Furthermore, the duties owed by the employer to a ward of admiralty equate with those owed by a

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[16] At the end of its argument, on page 22 of its petition, and without addressing the substance of its comment, Exxon asks the Court to also review Ellenwood's "state contract claims." This is the same tired argument which Exxon has hoisted before and which the district court branded "clear nonsense." (App. 41a). Furthermore, Ellenwood's contract claim was tried under federal maritime law and thus Exxon's comment makes no sense. Preemption is a constitutional doctrine developed under the Supremacy Clause, which, under certain limited circumstances, invalidates *state* laws. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824); *Massachusetts Medical Society v. Dukakis*, 815 F.2d 790, 791-96 (1st Cir.), *cert. denied*, 484 U.S. 896 (1987).

trustee to his beneficiary and a guardian to his ward. *Premeaux v. Socony-Vacuum Oil Co.*, 144 Tex. 558, 564, 192 S.W. 2d 138, 140 (1946). To disavow a contract in this case violates these duties. Moreover, Exxon's tenacious clinging to the principle of employment at will when it has no factual or legal connection to this case is at best a smokescreen for its patent lack of any colorable argument to support its petition.

As explained in the statement of the case, the substantial record evidence demonstrated the existence of a contract of employment which was other than at will. However, petitioner continues to disingenuously and selectively refer to the evidence to suit its needs regardless of the record before the jury and the fact that the jury, the District Judge and the First Circuit squarely rejected petitioner's manipulative factual arguments.[17] Nonetheless, "(t)his is not the place to review a conflict of evidence. . . . " *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951).[18] Rather, all facts necessary to support the judgment must be taken as found by the jury; otherwise there will be a near certain

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[17] Also, Exxon improperly continues to cite to selected paragraphs of the Complaint to make its arguments. The jury never saw the Complaint but it did see and hear over two weeks of evidence as did the presiding Judge who denied Exxon's motions for judgment as a matter of law and for a new trial (1a). At this stage, the Complaint is superfluous. *Fed.R.Civ.P.* 15. The purpose of a complaint is to give concise notice of the plaintiffs' claims. *Fed.R.Civ.P.* 8(a), 8(e) and 8(f). Moreover, given the Court's special solicitude for the seaman, it is an "ancient admiralty teaching" that the rules of pleading are even further relaxed in admiralty. *Archawski v. Hanioti*, 350 U.S. 532, 534 (1956). Thus, even if Exxon's characterizations of the Complaint are accurate, "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend *does not affect the result of the trial of these issues* . . . ." *Fed.R.Civ.P.* 15(b) (emphasis supplied).

[18] "In admiralty, as in other fields of the law, findings of the trier of fact will not be disturbed on appeal, unless the error is manifest clearly against the evidence." *Putnam v. Lower*, 236 F.2d 561, 565 (9th Cir. 1956), *citing, United States v. United States Gypsum Co.*, 333 U.S. 364, 365 (1948); *McAllister v. United States*, 348 U.S. 19, 20, 21 (1954). No such argument has been made.

collision with respondents' Seventh Amendment right to trial by jury. *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957); *Lumbermens Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 53 n. 5 (1954); *Smiley v. Kansas*, 196 U.S. 447, 454 (1905). "The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considers most reasonable." *Tennant v. Peoria & P.U.R.Co.*, 321 U.S. 29, 35 (1944). The jury has performed this function and its reasoned judgment should not be disturbed.

Furthermore, the record evidence upon which the jury founded its verdict contained much more than a mere policy statement. The evidence supported an express employment contract with an offer, an acceptance, a meeting of the minds, definite terms, duration and consideration (Tr. Vol. XI:43-44, 58, 69). The evidence demonstrated contracts, representations, letters, writings, policies and oral and written promises in addition to an employment policy.[19] Ellenwood and Exxon presented evidence from which the jury was free to conclude that a contract of employment existed, terminable only for just cause and that this contract was initiated by Exxon. Even Exxon's witness admitted that a "contract" existed (Tr. Vol. V:22); *Bunn v. Global Marine, Inc.*, 428 F.2d 40, 48 (5th Cir. 1970). Based upon the evidence, the jury properly found that Ellenwood and Exxon entered a maritime employment contract on other than an at-will basis. That Exxon's entire petition obfuscates the facts and completely ignores the record is not grounds for relief.[20]

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[19] Exxon seeks an inflexible rule in its favor based, *inter alia*, on its shipping articles. This argument is not based upon the record evidence. In fact, respondents could not pursue possible related causes of action because of petitioner's dilatory production of certain related documents at such a late stage of the trial that strategically, respondents were forced to leave them out of the case (Tr. Vol. V:214-217; VII:6-7).

[20] In addition, even if petitioner's selective focusing upon the policy statement is otherwise appropriate, whether the parties intended the policy to constitute an express or implied contract was a question of fact which the jury resolved in respondents' favor. *Brown v. United Methodist Homes*, 815 P.2d 72, 83 (Kan. 1991).

Moreover, even were this employment policy the true issue, the Court has already settled petitioner's purported implied contract issue. The Court has always recognized the existence of implied contracts in maritime employment. *Aguilar v. Standard Oil Co. of New Jersey*, 318 U.S. 724, 730 (1943) (maintenance and cure "has been recognized consistently as an implied provision in contracts of marine employment."); *Lauritzen v. Larsen*, 345 U.S. 571, 588 (1953); *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371, 372 (1932); *Hust v. Moore-McCormack Lines*, 328 U.S. 707, 715-16 (1946) (Jones Act remedy); 28 U.S.C. § 1333(1).

Further, with regard to Exxon's ridiculous argument that Ellenwood was an employee at will, *Smith v. Atlas Off-Shore Boat Serv., Inc.*, 653 F.2d 1057 (5th Cir. Unit A 1981) and *Findley v. Red Top Super Markets, Inc.*, 188 F.2d 834 (5th Cir.), *cert. denied*, 342 U.S. 870 (1951), do not provide a basis for granting its petition. In *Smith*, the Fifth Circuit created an exception to the contractually based employment at will rule for a seaman who admittedly was an employee at will. The issue of whether Smith was employed at will or whether, like Ellenwood, he had a contract to the contrary, was not before the court. In *Findley*, an unauthorized person started to hire a ship's crew. Before employment contracts could be signed, the crew was advised that the person who had hired them was not so authorized and that they should leave the ship. *Findley*, 188 F.2d at 835. Thus, the entirety of the conduct in issue in *Findley* happened before and without a contract ever being entered.[21]

Finally, Exxon's review of the common law of several states misses the point and violates the Local Rules of the Ninth Circuit. First, as explained above, this case is not merely based upon a policy statement on substance abuse.

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[21] In addition, the *Findley* court's analysis is faulty under the Court's precedent. *Compare*, 188 F.2d 834, fn. 1 with *Kossick, supra*. Thus, *Findley* is not good law and to the extent that *Smith* relies on *Findley*, neither is *Smith*. None of this, however, creates a federal question of such importance that the petition should be granted.

Even Exxon's own official testified that Exxon and Ellenwood made a "contract" (Tr. Vol. V:22). Exxon made this official responsible for deciding whether Ellenwood could return to work after he attended the rehabilitation program. Second, in its review of what it labels "prevailing" state law, Exxon improperly relies upon two decisions, *Franklin v. Delta Airlines, Inc.*, 951 F.2d 359 (Table) (text in WESTLAW) (9th Cir. 1991) and *Horne v. J.W. Gibson Well Service Co.*, 894 F.2d 1194 (10th Cir. 1990). With regard to *Franklin*, various notices appear with the Westlaw published decision.

> NOTICE: Ninth Circuit Rule 36-3 provides that dispositions other than opinions or orders designated for publication are not precedential and should not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel.

Id. (emphasis supplied). Moreover, *Franklin* is distinguishable as that employee signed documents expressly providing that he was an employee at will and the handbook upon which Mr. Franklin sought to rely contained an employment at will disclaimer and stated that his employment was at will.[22] *Horne* is also distinguishable as that plaintiff was also an employee at will under Wyoming law and while recognizing that personnel policies can create a contract of employment, that court wanted evidence in addition to the "mere existence" of those policies. *Horne*, 894 F.2d at 1195. As this record amply demonstrates, here there is much more evidence, including many representations which Exxon would now prefer to ignore than to respect. Furthermore, the prevailing state law of virtually every jurisdiction recognizes these claims, especially when, like here, the policy does not contain a disclaimer of employment at will. *See, Labor Relations Reporter: Individual Employment Rights Manual (BNA)* 505:5, 51-52 (July 1992); 28 U.S.C. § 1333(1). This black

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[22] Hawaii law, upon which the decision is based, recognizes the existence of contractual rights based upon employment handbooks. Id.; *Kinoshita v. Canadian Pacific Airlines*, 724 P.2d 110 (Haw. 1986).

letter law rings true within the admiralty jurisdiction. *Stetson*, 673 F. Supp. at 1135, 1136.

> Certainly it requires no citation of authority to support the statement that the Supreme Court of the United States and various of the United States Courts of Appeals have never, in construing Maritime Law, afforded a less favorable position to the seaman, the much favored ward of Admiralty, than the position afforded to the average, ordinary common law suitor.

Henderson v. Arundel Corp., 262 F. Supp. 152, 157 (D. Md. 1966).

Denying the petition will only serve to encourage irresponsible employers to be more responsible in how they structure their employment relationships, policies and practices. Any contrary prediction of a chilling effect is wholly imaginary. Also,

> (i)t must be remembered that we are dealing here with a contract, and therefore with obligations, by hypothesis, voluntarily undertaken, and not, as in the case of tort liability or public regulations, obligations imposed simply by virtue of the authority of the State or Federal Government. This fact in itself creates some presumption in favor of that law tending toward the validation of the alleged contract.

Kossick, 365 U.S. at 741. In sum, this case is an ordinary run of the mill contract dispute based on a well developed factual record which supports the result of which petitioner complains. This "self-imposed obligation" does not raise a question of such importance that this Court need be burdened with a review of an already thorough and sound opinion below (App. 21a).

The petition should be denied.

CONCLUSION

This case is about a seaman who had to seek the protection of the Federal Courts because after he was misdiagnosed an alcoholic (according to his employer's expert) and sought

treatment, his employer used the fact of his treatment to fire him in a crude public relations ploy to rebuild its public image in the wake of the Exxon Valdez. The Federal Courts have always served as a place of refuge and protection for the seaman, who, over the years, has needed the Courts' protection from abusive employment practices. The principles which the Court has developed reflect "a special solitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages." *Moragne v. State Marine Lines, Inc.*, 398 U.S. at 387. Declared to be "a settled canon of maritime jurisprudence," "certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules." *American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 281-82 (1980) (citations omitted); *Moragne*, 398 U.S. at 387, *citing, The Sea Gull*, 21 F. Cas. 909, 910 (No. 12,578) (C.C. Md. 1865). This ward of admiralty only seeks the same protection as that which the Court has extended to his brethren whom he has followed down to the sea.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 20, 1993

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

THEODORE M. ELLENWOOD, et al.,	)	
Plaintiffs	)	Civil No. 90-86-P-C
v.	)	
EXXON SHIPPING COMPANY,	)	
Defendant	)	

MEMORANDUM AND ORDER ON DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR FOR NEW TRIAL

Exxon Shipping Company has renewed its motion for judgment as a matter of law on the Ellenwoods' negligent infliction of emotional distress claims. Fed R. Civ. P. 50(b). In the alternative, Exxon Shipping asks that I overturn the jury verdict and order a new trial. Fed. R. Civ. P. 59. Exxon Shipping also moves for a new trial and judgment as a matter of law on the breach of contract and promissory estoppel claims, alleging several errors in the jury instructions and other miscellaneous legal errors. I now *GRANT* the motion for judgment as a matter of law with respect to the negligent infliction of emotional distress claim, *DENY* the motion for new trial on the negligent infliction count and *DENY* the motion on the contract and promissory estoppel claims.

Emotional Distress

I have previously ruled that the emotional distress claims are governed by maritime law. *See Ellenwood v. Exxon Shipping Co.*, No. 90-86-P-C, slip op. at 4-5 (Oct. 15, 1991); *see also Ellenwood v. Exxon Shipping Co.*, No. 90-86-P-C, slip op. at 1-3 (Jan. 2, 1992) (granting Exxon Shipping's motion for summary judgment on breach of duty of good faith and fair dealing claim). I will not repeat my reasons here. My research and that of the parties have revealed that reported maritime law, however, is essentially mute as to the controlling substantive rules in this case. Exxon Shipping has argued that since no explicit authorization for the Ellenwoods' claims can be found in maritime law, those claims should be dismissed on that ground alone. Unambiguous dicta in a governing line of maritime cases, however, require me to pursue the subject farther.

In *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864-65 (1986), the United States Supreme Court stated: "Drawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." In that case, the Supreme Court recognized and endorsed lower court adoption of general negligence principles and products liability law as part of the general maritime law. Moreover, the Court recognized that maritime law, in the absence of a statute, is "developed by the judiciary." *Id.* at 864.

Under First Circuit authority, state law or general common-law principles may inform the general maritime law when the maritime law is silent on a particular issue,

provided that state law does not conflict with Congressional maritime policy. *See Conner v. Aerovox, Inc.*, 730 F.2d 835, 842 (1st Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985) ("There is no question that federal courts may borrow from a variety of sources in establishing common law admiralty rules to govern maritime liability where deemed appropriate."); *Pino v. Protection Maritime Ins. Co., Ltd.*, 599 F.2d 10, 14 (1st Cir.), *cert. denied*, 444 U.S. 900 (1979) (applying § 766 of the *Restatement (Second) of Torts* as a "recognized national standard from which to fashion a controlling principle of substantive federal maritime law"); *accord, Lewis v. Timco, Inc.*, 716 F.2d 1425, 1427 (5th Cir. 1983) ("In maritime tort cases courts traditionally apply principles of maritime law, as informed by common law tort developments, . . . unless a policy determination has been made by Congress. . . . Admiralty courts make their own decisions but, true to legal analogical processes, do so with an awareness of other courts' solutions to similar problems. . . . ").

These cases make clear that I cannot dismiss a claim merely because maritime precedents are silent, but that I should turn to well-established common-law principles of national applicability in determining the scope of a claim in such circumstances. The concern for uniformity, frequently expressed by the courts and emphasized in my order on Exxon Shipping's summary judgment motion, *Ellenwood v. Exxon Shipping Co.*, No. 90-0086-P-C, slip op. at 4 n.5 (October 15, 1991), supports employing only those common-law principles that have been widely and consistently recognized in land-based law. Furthermore,

paramount attention must be paid to Congressional policy directives expressed in maritime legislation. Accordingly, I approach the claim of negligent infliction of severe emotional distress guided by Congressional policy pronouncements embodied in the Jones Act and judicial glosses on those enactments; by time-honored articulations of common-law principles, such as the *Restatement (Second) of Torts;* and by trends in state common-law doctrine.

Much of the parties' argument has focused on several FELA/Jones Act cases.[1] The Ellenwoods' claim for negligent infliction of emotional distress, however, is not a Jones Act claim. They chose not to plead the Jones Act; instead, their claim arises under general maritime law. Nonetheless, FELA/Jones Act case law is a sensible place to look for guidance. The Jones Act articulates Congress' general policy on the limits of seamen's recovery for negligence. Thus, a court should not lightly exceed any limitations laid down in the Jones Act or in authority interpreting the Jones Act or FELA.

In 1977, it seemed clear in this Circuit that recovery for emotional distress under FELA, and thus the Jones Act, required a physical injury. *Bullard v. Central Vt. Ry.*, 565 F.2d 193, 197 (1st Cir. 1977). In 1985, however, a Ninth Circuit decision stated that plaintiffs could recover emotional damages under FELA without any physical injury. *Buell v. Atchison, Topeka & Santa Fe Ry.*, 771 F.2d 1320, 1322-23 (9th Cir. 1985). The United States Supreme Court

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[1] The Jones Act incorporates FELA's standards for liability. *See* 46 U.S.C. app. § 688(a).

undertook to hear the *Buell* case but then declined to consider this particular issue because of the lack of an adequate record: "Since, through no fault of either party, we do not know what all those facts are in this case, we cannot begin to decide whether respondent will be able to support his allegation that petitioners are liable to him under the FELA." *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 570 (1987). Although the Court declined to rule on this issue, it nevertheless provoked an unfortunate uncertainty in the trial bar and the lower courts by adding, "whether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity," *id.* at 568, and, therefore, that "the question whether one can recover for emotional injury may not be susceptible to an all-inclusive 'yes' or 'no' answer," *id.* at 570.

That same year the First Circuit brought the uncertainty home to this jurisdiction. In *Moody v. Maine Cent. Ry. Co.*, 823 F.2d 693 (1st Cir. 1987), it affirmed a case from this district granting summary judgment on an emotional distress claim to a defendant where there was no physical injury. But like the United States Supreme Court it succumbed to the temptation to raise other possibilities, thereby engendering uncertainty among trial lawyers and trial courts. It officially read *Buell* as "an attempt to leave the door to recovery for wholly emotional injury somewhat ajar but not by any means wide open," *id.* at 694, and concluded that the Supreme Court, "at the very least, [cast] doubt on the doctrine attributed to us in *Bullard* that damages may not be awarded for mental or emotional injuries unaccompanied by physical injury." *Id.*

Rather than resolve this open issue after highlighting it, however, the First Circuit declined "the invitation to make this a pioneer case exploring the frontier possibly opened up by *Buell*," and left the trial bar and the trial courts to bear the consequences of the highlighted uncertainty.[2]

In light of the First Circuit's *Moody* declaration, I concluded before trial that Jones Act principles were unclear and that, although the Jones Act was not finaly determinative of the issue in this maritime case, its role was sufficiently important that I should allow the negligent infliction claim to go to the jury so that the First Circuit would have a record upon which to rule. Had I followed the old rule (which I do today for reasons I will explain shortly) and been declared wrong, the subsequent reversal by the First Circuit would have required a new trial of this lengthy case which has already consumed thousands upon thousands of dollars. Since an appeal was highly likely, I decided that the more prudent and

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[2] Tantalizing references to possibilities in other cases not then before the court have been a luxury that appellate courts could afford in more innocent times. Perhaps the practice even helped judges participate in the development of the common law by inviting further litigation. But now we operate in an era where we are told that federal litigation is too frequent and that it is both too time consuming and too expensive. *See* Civil Justice Reform Act of 1990, Pub. L. No. 101-650, tit. I, § 102 (1990) (codified as 28 U.S.C. §§ 471-482). When an appellate court raises a new issue without resolving it, it guarantees that the cost of litigation will increase. Another decision point is created: briefs must be written, facts must be adduced, motions must be presented and lower court judges must try to divine what the appellate courts are looking for.

more economical course was to permit the plaintiffs to put in their case as if the First Circuit had indeed changed the FELA/Jones Act rule and as if the change would affect the governing principle in this maritime case. I now rule, however, that as a trial court judge I cannot read the First Circuit's musings in *Moody* as having overruled the *Bullard* rule. *Moody* did not explicitly overturn *Bullard.* Certainly there are hints and half-steps there. But as a trial judge I must follow the precedents as they exist. Should the First Circuit decide to overrule *Bullard* and decide that this new FELA/Jones Act principle controls this maritime case, the record has been made and the Circuit can simply reinstate the jury's verdict. On the other hand, if the First Circuit chooses not to overrule *Bullard,* then it is in a position to affirm the judgment on the law.

I therefore conclude that under *Bullard* a physical injury is still required to recover emotional distress damages under FELA. Since the Jones Act incorporates FELA standards for liability, *Bullard* must be read as recognizing a general congressional policy limiting maritime recovery for negligent infliction of emotional distress to those claims based on physical injury. Today I apply that policy in this maritime case.

Applying the *Bullard* rule is not simply the triumph of *stare decisis.* Imposing such a limitation under general maritime principles is supported by what has taken place in other areas. The nationwide movement toward a standard allowing recovery for wholly emotional injury without some physical manifestation has been halting. The *Restatement (Second) of Torts* was quite clear in requiring

physical injury as an element of a negligent infliction of emotional distress claim in 1965:

> If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

Restatement (Second) of Torts § 436A (1965). Comment b discusses the three traditionally favored policy rationales for this rule: first, emotional disturbances without physical consequences have traditionally been regarded as "in the realm of the trivial," and therefore fall "within the maxim that the law does not concern itself with trifles"; second, a physical harm requirement furnishes a "guarantee of genuineness" to the fact-finder, thus limiting the prospects for a flood of fraudulent claims; and third, when the level of culpability reaches only the level of negligence, the "fault is not so great that [the actor] should be required to make good a purely mental disturbance." *Id.*, comment b.[3]

The *Restatement* enunciation of the rule is now over 25 years old, and some jurisdictions, among them Maine, have abandoned the physical injury requirement. *See*

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[3] The *Restatement* did envision a separate tort without physical injury: intentional or outrageous infliction. *See Restatement (Second) of Torts* § 46 (1965). Elimination of the physical injury requirement for the negligence tort essentially eliminates the need for the intentional tort. It is hard to imagine a case in which a factfinder can find intentional and outrageous conduct but not find a breach of the standard of care or negligence.

Gammon v. Osteopathic Hosp. of Me., Inc., 534 A.2d 1282 (Me. 1987). But the trend is not uniform. In *Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982), the Massachusetts Supreme Judicial Court resisted the invitation to allow recovery for negligently inflicted emotional distress in the absence of corresponding physical harm. That court observed in 1982 that "[j]urisdictions allowing recovery for emotional distress without proof of physical harm in negligence cases are clearly in the minority." *Id.* at 174-75; *see also id.* at 175 n.5 (surveying rules in various jurisdictions). Recent academic commentary continues to reflect the division of authority: "Where the defendant's negligence causes only mental disturbance, without accompanying physical injury, illness or other physical consequences, and in the absence of some other independent basis for tort liability, the great majority of courts still hold that in the ordinary case there can be no recovery." W. Page Keaton, et al., *Prosser and Keeton on the Law of Torts* § 54 at 361 (5th ed. 1984). *See also* Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective versus Subjective Indices of Distress*, 33 Vill.L.Rev. 781 (1988) ("Currently, a large number of jurisdictions follow a combination of both the zone of danger and physical manifestation tests as limiting devices on actions for negligent infliction of mental distress.")[4]

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[4] Although the physical injury rule seems arbitrary in the sense that there may be legitimate emotional distress claims without physical injury, it does have the great advantage of being easily defined and determined in today's complex litigation world. With expensive expert testimony available to support or reject almost any claim, a clear and easily-applied rule

Thus, the *Restatement* and a significant number of state jurisdictions are in agreement with the Congressional policy choices articulated by the First Circuit in *Bullard*. Therefore, I conclude that a plaintiff alleging negligent infliction of emotional distress under the general maritime law must prove an accompanying physical injury. No evidence of physical injury or physical impact was presented to the jury here.[5] Exxon Shipping's motion for judgment as a matter of law on these claims is therefore **GRANTED.** The Clerk shall enter judgment for the defendant on Count VIII.[6] Exxon Shipping has not advanced any other argument that would justify granting

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saves parties large amounts of litigation costs and attorney fees and reduces needed judicial time. Other tests that may involve multitudes of factors such as suggested by the Supreme Court in *Buell*, 480 U.S. at 568-70, might result in better individual justice in a given case yet so contribute to the expense and time-consuming nature of the litigation process that justice would be delayed and thereby denied in many other cases. In this era of scarce resources courts cannot ignore such effects.

[5] The Ellenwoods did offer some evidence of loss of sleep, loss of appetite, etc. However, this is clearly not the kind of physical injury contemplated by *Bullard*, nor by the *Restatement (Second) of Torts*.

[6] Exxon Shipping also argues in its motion for judgment as a matter of law that the evidence was insufficient to support a finding that the Ellenwoods suffered severe emotional distress. I conclude that there was sufficient evidence in the record on both the severity of the Ellenwoods' emotional distress and causation to have created a jury question.

Finally, Exxon Shipping argues that the jury verdict should be overturned because there were no guarantees of genuineness supporting the Ellenwoods' claimed injury. This contention is resolved by my conclusion that physical injury is still a precondition for recovery.

a new trial. Therefore, Exxon Shipping's motion for new trial on Count VIII is **DENIED.**

This ruling, of course, also supports my earlier denial of punitive damages. Without a tort recovery, the plaintiffs are not entitled to punitive damages.

Contract and Promissory Estoppel

Exxon Shipping moves for a new trial or for judgment as a matter of law on both the breach of contract and promissory estoppel verdicts.[7] It advances four arguments: first, that I erred in allowing the contract and promissory estoppel claims to go to the jury because at-will employment rules preclude the possibility of finding that a contract or enforceable promise existed; second, that the Rehabilitation Act of 1973 pre-empted Ellenwood's breach of contract and promissory estoppel claims; third, that I erred in instructing the jury not to subtract Mr. Ellenwood's annuity from its award of damages; and fourth, that I erred in my instruction concerning Exxon Shipping's employee ranking system. Only the last of these arguments raises any new issues.

I addressed the first two objections in my order issued October 15, 1991, on Exxon Shipping's motion for summary judgment. *Ellenwood v. Exxon Shipping Co.*, No.

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[7] The jury found for Ellenwood on both the breach of contract and the promissory estoppel claim. The jury awarded $677,648 for the breach of contract claim and zero dollars for the promissory estoppel claim. However, it is quite clear that the jury was simply avoiding duplication of damages in accordance with my instructions, and that the damage award is supported by both claims.

90-0086-P-C, slip op. at 2-4 & 5-6 (October 15, 1991). Exxon Shipping does not raise any new arguments in this post-trial motion, and I see no reason to disturb my earlier rulings on these two matters.

Exxon Shipping's argument that my instruction on the annuity was in error was the subject of a lengthy conference of counsel on the morning of closing arguments. The lawyers had an opportunity to argue the issue fully, *see* Tr. Volume XI, page 2, line 1 – page 23, line 11, and I gave a detailed ruling in chambers, *see* Tr. Volume XI, page 33, line 13 – page 35, line 17, and reiterated the ruling at sidebar, *see* Tr. Volume XI, page 72, lines 20-21. Given the state of the record, I see no basis for a different ruling.

Finally, Exxon Shipping argues that my instruction concerning the company's employee ranking system was in error. This issue was addressed in the conference of counsel on the morning of closing arguments, *see* Tr. Volume XI, page 23, line 16 – page 29, line 14. Exxon Shipping also raised its objections at sidebar and suggested an alternative instruction, *see* Tr. Volume XI, page 64, line 14 – page 66, line 9. I reiterated my previous resolution of the issue at sidebar as well, *see* Tr. Volume XI, page 69, line 17 – line 22; page 72, line 6 – line 14. As I said there, the conventional instruction used in discrimination cases cannot simply be transposed without modification to this damage causation issue in a contract/estoppel case. The issues and policies at stake are different.

Here, however, Exxon Shipping does raise one new issue. The company refers to my memorandum and order

on the punitive damages claim, issued on February 21, 1992. *Ellenwood v. Exxon Shipping Co.*, No. 90-86-P-C, slip op. (Feb. 21, 1992). There, I engaged in a thorough review of the record to determine whether the plaintiffs had presented sufficient evidence to proceed with their punitive damage claim. I attempted to simplify the task of reviewing a voluminous record by breaking the evidence down into separate categories. *Id.* at 5-8. One of those categories was evidence concerning Exxon Shipping's employee evaluation and ranking procedures. I evaluated this evidence in light of the maritime law standard for punitive damages and found that the plaintiffs had not presented evidence concerning Exxon Shipping's conduct to justify allowing them to proceed with their punitive damages claim.

Exxon Shipping now attempts to use the language of my memorandum opinion on punitive damages for the negligence claims as a vehicle for arguing that it is entitled to judgment as a matter of law on the contract and estoppel claims.[8] But in doing so, it ignores the context of the punitive damage opinion. In that opinion I was reviewing the evidence to determine whether a reasonable juror could have found that the plaintiffs showed that Exxon Shipping acted with the level of culpability

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[8] Exxon Shipping refers specifically to two passages in that opinion. First, on page 7, the opinion states, "However, there was no testimony to indicate that the rankings were intentionally manipulated with the intent of denying or subverting the rights of any employees." *Id.* at 7. Second, a passage on page 9 states, "There was no testimony that the ranking process was intentionally manipulated or used in a way to undermine the rights of Ellenwood." *Id.* at 9.

necessary to justify punitive damages. The focus of that inquiry was the plaintiffs' burden of proof to show the blameworthiness of Exxon Shipping's conduct. I found that no reasonable factfinder could conclude the plaintiffs had met their burden of proof.

The issue raised by Exxon Shipping in its motion presently before the court is distinct from the punitive damage inquiry. Here, the issue is not the plaintiffs' burden of proof on punitive damages, but Exxon Shipping's burden of proof in minimizing the Ellenwoods' contractual or estoppel damages. In order to reach this issue, the jury must first have found (as it did) that Exxon Shipping breached its contract (or principles of promissory estoppel) with Ellenwood when it removed him as Chief Engineer and that damages flowed from that event. Exxon Shipping is seeking to limit those damages by trying to prove that Ellenwood would later have been terminated anyway. Since Exxon Shipping bears the burden of proof on this issue (and this is *not* a discrimination case where Exxon Shipping would have only the burden of *articulating* a nondiscriminatory motive), I am doubtful that judgment could ever be entered in its favor as a matter of law. The jury was always free to disbelieve any or all of Exxon Shipping's evidence on this issue of termination for independent reasons. Thus, it is completely consistent to rule that the Ellenwoods had not met *their* burden of proof to show conduct by Exxon Shipping that would justify punitive damages, yet rule that the jury could choose to disbelieve Exxon Shipping's evidence that it would have terminated Ellenwood for independent reasons.

Exxon Shipping characterizes my statements in the punitive damage opinion as a finding that Ellenwood

would have been terminated for "independent, non-pretextual reasons." Reply Memorandum in Support of Exxon Shipping Company's Motions for Judgment as a Matter of Law and for a New Trial, at 2. Given the difference between the two inquiries, Exxon Shipping has clearly mischaracterized the punitive damage opinion. My finding that the plaintiffs failed to carry their burden on punitive damages cannot result in a conclusion as a matter of law that Exxon Shipping prevailed on a limitation of damages issue where Exxon Shipping had the burden of proof.

I see no reason to disturb my earlier ruling on this part of the jury instruction. Exxon Shipping's motion for judgment as a matter of law or for a new trial on the contract and promissory estoppel claims is **DENIED.**

SO ORDERED.

Dated at Portland, Maine this 26th day of March, 1992.

/s/ D. Brock Hornby
D. Brock Hornby
United States District Judge

A TRUE COPY
ATTEST: William S. Brownell, Clerk

By /s/ Brenda R. Gilland
Deputy Clerk